No. 89-101

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

COLEMAN A. YOUNG, MAYOR OF THE CITY OF DETROIT,
Petitioner,

v.

COUNTIES OF OAKLAND and MACOMB,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM OF PETITIONER COLEMAN A. YOUNG

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INTRODUCTION

In their briefs opposing the Petitions for certiorari, Respondents concede that the Court of Appeals "assume[d] . . . that any and all overcharges were passed on to the counties' own customers, the municipalities." A-10, 866 F.2d at 845. They recognize that under the Michigan statutory scheme, the Counties collect and retain in segregated funds the monies paid by the municipalities for sewerage services, make all payments to Detroit from these funds, are prohibited from using their general funds for this purpose, and may not make a profit or incur a loss on the sewerage funds. These uncontroverted facts mean that the Counties lack a sufficient interest in the outcome of this suit to be proper antitrust plaintiffs. While the Counties make several new arguments in their briefs in

opposition to the Petition, none of these arguments detracts from the merits of the Petition.

I.
BECAUSE STATE STATUTE REQUIRES THE COUNTIES TO PASS ON ALL DAMAGES AND ANY RECOVERY, THEY LACK A SUFFICIENT INTEREST IN THE OUTCOME OF THE SUIT TO BE PROPER ANTITRUST PLAINTIFFS.

Macomb County, rather surprisingly, relies on the Michigan statutory scheme as the centerpiece of its opposition to the Petition. Macomb starts with the premise that the antitrust laws should be construed to further the policies of deterrence and compensation by encouraging injured parties to file private suits. Macomb County Brief at 9. Macomb agrees with Petitioner that under this Court's decisions in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co.* v. *State of Illinois*, 431 U.S. 720 (1977), a defense may be available where the direct purchaser has passed on all of the alleged overcharges pursuant to a cost-plus contract or its equivalent. Macomb then concludes that this case falls within an *exception* to such a pass-on defense, because the Counties will also be required to pass on any *recovery* to the municipalities.

This remarkable conclusion stands Macomb's premise on its head. Under the reasoning of *Illinois Brick*, if the direct purchaser has standing to sue, the indirect purchasers *lack* standing. But a direct purchaser which has passed on all damages *and* will pass on any recovery pursuant to cost-plus contracts or state regulation would rarely have an incentive to sue.[1] A holding that a party in the Counties' circumstance has standing thus would *discourage* rather than encourage the filing of private antitrust suits. This would ill serve the goal of encouraging private antitrust enforcement.

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[1] Apart from the salutary effect success in this case may have on the political fortunes of a few suburban politicians, it is difficult to hypothesize any reason for the Counties to pursue the present litigation.

The declared intent of both Oakland and Macomb Counties to pass on any recovery in its entirety also refutes the Counties' contention that horizontal allocation of damages among the municipalities or end users would involve insurmountable factual issues. The Counties have thus conceded that they intend to do what they contend the courts would find impossible to do.

Because the Counties have passed on 100 percent of any overcharges pursuant to state statute, they lack standing to sue under the reasoning of *Illinois Brick*, *Hanover Shoe* and *State of Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipeline Co.*, 852 F.2d 891 (7th Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 543 (1988). That the Counties must also pass on any damage recovery makes this conclusion inescapable. This Court should grant certiorari to make it clear that the antitrust laws grant standing only to private plaintiffs with the requisite interest in the outcome of the suit.

II.
THE POTENTIAL AND INDIRECT INJURIES POSTULATED BY OAKLAND COUNTY DO NOT VEST THE COUNTIES WITH ANTITRUST STANDING.

While Oakland County also recognizes that it has passed on all alleged overcharges to the municipalities, Oakland seeks to base antitrust standing on two types of potential injury: (1) the possibility that in the future, the municipalities may not pay for sewerage services in full or on time; and (2) the possibility that in the future, higher sewerage service rates may make it more difficult for Oakland to attract or retain population and economic development, ultimately impacting its tax revenues. Oakland County Brief at 21.[2]

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[2]Oakland also devotes considerable verbiage to a refutation of Petitioner's "fundamental" contention that the Counties are not "'direct purchaser[s]' of sewage services . . . ." Brief at 17. Oakland ignores Petitioner's express assumption, for the purpose of the Petition, that the Counties were direct purchasers of a relevant service. Petition at 7 n. 9.

Neither of these purported types of injury is pleaded in the complaints or supported by Oakland's affidavit.[3] Oakland's complaint refers only to damages in the form of overcharges:

> Plaintiff [Oakland County] has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated.

Complaint ¶ 48. It is these overcharges which the Counties have passed on as required by statute. Oakland repeatedly refers to the assertion in its affidavit that under the contracts Oakland must pay Detroit for sewerage services "whether the municipalities pay the county on time or in full." Oakland County Brief at 6 & 18 n.13. Neither the complaint nor the affidavit, however, asserts that the municipalities have ever failed to pay in full or on time. In any event, the Counties are prohibited by statute from incurring a loss on the Sewerage Funds. Mich. Comp. Laws § 123.745.

Even more significantly, under this Court's holding in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), only a party which has suffered "antitrust injury" may bring a private antitrust suit. Antitrust injury consists only of damage which "flows from that which makes defendant's acts unlawful." 429 U.S. at 489. Injury to a County if a municipality fails to pay does not "flow[] from" the defendants' actions, but from the actions of the municipality. Under *Brunswick*, therefore, nonpayment by the municipalities would not result in antitrust injury to the Counties. As the district court noted, "[p]erhaps a more proper cause of action, if the goal is to replete the Funds, would be a contractual one against the municipalities." A-41, 628 F. Supp. at 612. In accord is *State of South Dakota* v. *Kansas City Southern Industries, Inc.*, _____ F.2d _____, 1989-1 Trade Cas. (CCH) ¶ 68, 635 (8th Cir. 1989).

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[3]Affidavit of Robert H. Fredricks II in Support of the Motion to Alter Judgment, reprinted in Appendix B to Oakland County's Brief.

Oakland's attempt to base antitrust standing on the possibility that higher sewerage rates may induce businesses and residents to locate elsewhere (besides appearing nowhere in the complaint or affidavit) has an equally fatal defect. Oakland is improperly attempting to sue as *parens patriae* for injury done to its residents.

While the Sixth Circuit hypothesized that the alleged overcharges might harm economic growth or development in the Counties, it did so only in the portion of its opinion dealing with constitutional standing. A-14, 866 F.2d at 847. The Sixth Circuit did not seek to premise antitrust standing on such injury, and with good reason.

In *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251 (1972), the State of Hawaii filed suit as *parens patriae* against an oil company, seeking to recover for various types of injury resulting from overcharges imposed in violation of the antitrust laws. Among the categories of injury alleged was the adverse effect the overcharges had on "the economy and prosperity of the State of Hawaii." 405 U.S. at 255. The Court reasoned:

> A large and ultimately indeterminable part of the injury to the "general economy," as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under § 4.

405 U.S. at 264. The Court concluded that injury to the "general economy" did not constitute injury to the "business or property" of the State, and therefore failed to vest the State with standing to sue as a private plaintiff under Section 4 of the Clayton Act, 15 U.S.C. § 15.

In reaction to *Hawaii* v. *Standard Oil*, Congress in 1976 adopted Section 4c of the Clayton Act, 15 U.S.C. § 15c (Supp. 1989), which grants the States power to sue as *parens patriae* for injury to the "property" of "natural persons residing in such State." Section 4c, however, grants such standing only to the States, not to counties or other political subdivisions. Nor does this section allow even the States to sue as *parens patriae* for injury to their corporate residents. By basing its claim to antitrust standing

on possible injury to its general economy, Oakland is unabashedly seeking to sue as *parens patriae* for injury done to its natural *and* corporate residents.

Countless other things, apart from rates for sewer services, undoubtedly — and more directly — affect the local economy. For example, rates and quality of gas, electric, telephone and other utility services; plant locations and closings; tax rates and land use regulation by competing municipalities; and even a decision to relocate a professional sports team or trade a star player may affect an area's ability to compete for population and industrial development. Oakland's reasoning would empower local governments to sue under the antitrust laws regarding any decision or practice, public or private, affecting any service or facility which by some stretch of the imagination might have a negative impact on an area's attractiveness. Oakland's sweeping approach to antitrust standing runs headlong into *Hawaii* v. *Standard Oil*.

On this point, Oakland mistakenly relies on *Carter* v. *Berger*, 777 F.2d 1173 (7th Cir. 1985). The defendant in that case allegedly defrauded Cook County on property taxes. The Seventh Circuit held that the County had standing to sue the defendant under RICO, and that other taxpayers lacked standing. It rested its holding in part on the assumption that

> [g]overnmental units of Cook County do not necessarily raise innocent people's taxes by $1 to offset every loss of $1 to fraud. The government is concerned about the overall rate of tax; higher taxes may induce people and businesses to move away and may depress economic activity.

777 F.2d at 1177. The Court of Appeals thus speculated that vertical damage apportionment problems may result from the county's desire to hold taxes down in order to spur economic development. The Sixth Circuit applied no such reasoning in its ruling on antitrust standing. To the contrary, it expressly assumed "that any and all overcharges were passed on to the counties' own customers, the municipalities." A-10, 866 F.2d at 845. Because this case involves no issue of vertical damage apportionment — the Counties have absorbed no part of any overcharge — *Carter* is inapposite.

Oakland attempts feebly to distinguish *Panhandle Eastern* on the ground that the direct purchaser in that case was a public utility, while the direct purchasers in the present case are governmental units concerned about the general economy. The Counties in the present case, however, are in exactly the same position as the utility which was the direct purchaser in *Panhandle Eastern*. Both cases involve a utility service as to which users have no reasonable alternative. The direct purchaser in both cases passed all overcharges on to others farther down the distribution chain pursuant to state regulation. Under *Hawaii* v. *Standard Oil*, mere concern about the general economy does not vest the Counties with standing. The conflict between the Sixth and the Seventh Circuits is clear and complete.

Finally, in what may be its most incomprehensible argument of all,[4] Oakland declares that Petitioner has asked this Court "to reverse or limit the Court's holdings in *Hanover Shoe* and *Illinois Brick* . . . ." Oakland County Brief at 29. One can search in vain for any request by Petitioner that this Court do anything of the sort. Petitioner has requested the Court to answer questions left unresolved in those cases, and to do so in a way which is consistent with their reasoning and that of the Seventh Circuit in *Panhandle Eastern*.

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[4]Oakland also incorrectly states that the Counties' allegations regarding the Mayor's fiduciary duty are not at issue in the three pending Petitions. Oakland County Brief at 9 n. 10. As Petitioner noted, the constitutional standing arguments raised by the City of Detroit and Nancy Allevato, *et al.*, in which Petitioner joins, would be dispositive of the Counties' fiduciary duty claims. Petition at 6 n. 8.

CONCLUSION

This Court should grant certiorari to resolve the conflict among the Circuits, to provide uniformity in administration of the antitrust laws, and to provide guidance to the lower courts and the public.

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